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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 555

MORRIS TRIEBER,
Petitioner,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt,
Respondent.

PETITION OF MORRIS TRIEBER FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

MORRIS TRIEBER,
2020 St. Francis, San Carlos, California,
Petitioner in Propria Persona.

JOSEPH A. BROWN,
1020 De Young Building, San Francisco 4, California,
Of Counsel.

Printing Co., San Francisco, California

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No.

MORRIS TRIEBER,
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vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt,
Respondent.

PETITION OF MORRIS TRIEBER FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

The petition of Morris Trieber for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit respectfully shows to Your Honors:

(a) REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit is reported in ..... Fed. 2d .....

The District Court did not file a written opinion. The order of the District Court dismissing the petition for review of the order of the referee in bankruptcy by a judge is set forth at page 52 of the transcript of record.

(b) A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The date of the judgment or decree of the Court of Appeals sought to be reviewed and the time of its entry: Sept. 5, 1956.

(ii) The date of the order of the Court of Appeals respecting a rehearing: Rehearing denied October 8, 1956.

(iii) The statutory provision believed to confer upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari: U. S. Code, Title 28, Section 1254, subdivision (1).

(c) THE QUESTIONS PRESENTED FOR REVIEW.

On petition of the respondent, the referee in bankruptcy at San Francisco in the Northern District of California issued an order directed to the petitioner requiring him to show cause why he should not be

required to pay to the respondent, as trustee of the estate of the said bankrupt, the sum of $40,000 as compensatory and punitive damages for alleged fraud upon the bankrupt corporation.

For answer and return to the said order, the petitioner moved to dismiss the petition and to discharge the order to show cause for want of jurisdiction. The referee made what was styled, "An Order, Judgment and Decree" overruling petitioner's objection to his jurisdiction to make the turnover order. Petitioner petitioned the District Court for a review of the referee's order, which petition was denied by the District Court upon the ground that the order was interlocutory and not final. (TR 52.)

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which, on motion of respondent, dismissed the appeal upon the ground that the order was interlocutory and that the Court had no jurisdiction of the appeal. A copy of the opinion of the Court of Appeals is appended to this petition pursuant to the provisions of subdivision 1(i) of Rule 23 of this Court.

These are set forth in detail hereafter in the statement of the case, and are here omitted in the interest of brevity.

(d) THE STATUTE INVOLVED.

The statute involved in this case is Section 47, Title 11, U. S. Code:

> *"Jurisdiction of Appellate Courts:*
>
> "9a) The United States Courts of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy to review, affirm, revise or reverse, both in matters of law and in matters of fact."

(e) STATEMENT OF THE CASE.

Gayne Sales Co., Inc., a Cailfornia corporation, was adjudicated a bankrupt on August 24, 1954, and the proceeding was referred to the referee in bankruptcy. (TR 2.)

On October 15, 1954, Morris Trieber filed a proof of claim, setting forth that the bankrupt corporation was at the time of the filing of its petition and theretofore justly indebted to him in the sum of $3,162.24, itemized as follows:

For salary for services performed for the corporation pursuant to an oral agreement, $1,600.00; for money paid by claimant on a note owing by the bankrupt, which note claimant had guaranteed and on which note claimant paid $750.00; for goods, wares

and merchandise sold and delivered to the bankrupt, $382.65; paid by claimant on behalf of bankrupt on a judgment rendered against the bankrupt, which judgment this claimant guaranteed, $407.89; total $3,141.54.

It was further alleged that no part of the debt or liability had been paid. On June 20, 1955, the trustee filed a document entitled "Trustee's Objection to the Allowance of the Claim of Morris Trieber and Petition for Turnover Order." This pleading, after denying the indebtedness, sets forth what is denominated: "A further, separate and distinct defense to the allowance of said claim, and as grounds for further relief." This contains the following allegations:

> "That from the inception of the said incorporation and during all of the times mentioned herein, the said Morris Trieber was one of the incorporators of the said corporation, and together with I. E. Arian, Jerome R. Gayne and Samuel Gayne, was during all of the times herein referred to, a director of said corporation, and that the said Morris Trieber was at all times herein referred to an officer of said corporation, to wit, the secretary thereof.
>
> "That heretofore and on or about the 8th day of March, 1951, at a meeting of the Board of Directors of said corporation, at which all of the directors aforenamed were present, and at which meeting the said Morris Trieber was present as director and as secretary of the said corporation, the said corporation adopted the following resolution:
>
> " 'Resolved, that the Secretary of this corporation, Morris Trieber, shall forthwith make ap-

plication to the Commissioner of Corporations of the State of California for permission to issue capital stock of this corporation, as follows:

" 'To I. E. Arian, for the transfer by him to this corporation of the business carried on and conducted by him at 1151 Mission Street, including generally U. S. merchandise, new and used clothing, camping equipment, hunting clothes, shoes and leggings, and general merchandise of all kinds, including fixtures and office equipment and the good will of said company now operated under the name of U. S. Army Surplus and I. E. Arian, one hundred (100) shares of the capital stock of this corporation of the par value of Ten Thousand Dollars ($10,000.00), and to pay to him the sum of Twenty-five Hundred Dollars ($2500), which sum has already been paid.

" 'To Jerome R. Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars ($10,000) par value, for the sum of Ten Thousand Dollars ($10,000) in cash.

" 'To Samuel Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars ($10,000) par value, for the transfer to this corporation of merchandise of the fair and reasonable value of $6,708.18, and the payment in cash of $3,291.82.

" 'To Morris Trieber, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars ($10,000) par value, for the transfer by him to this corporation of merchandise of the fair and reasonable value of $8,967.10 and payment in addition thereto of cash in the sum of $1,032.90.'

"That said resolution was adopted upon the reliance of said Board of Directors upon the representations of the said Morris Trieber at that said meeting that he, the said Trieber, owned surplus merchandise of the kind and character which said corporation was organized to sell of the fair and reasonable market value of $15,675.28; that he, the said Morris Trieber, was indebted to Samuel Gayne, one of the directors of the said corporation, in the sum of $6,708.18; that he, the said Trieber, and Samuel Gayne had agreed between themselves that said indebtedness of Trieber to Gayne was to be paid by the said Trieber delivering to the said corporation on behalf of Gayne, merchandise of the reasonable value of $6,708.18 in partial payment of stock to be issued to Samuel Gayne by the said corporation upon approval by the Department of Investment, Division of Corporations of the State of California and that he, the said Trieber, would in consideration of the said Samuel Gayne, I. E. Arian and Jerome Gayne, subscribing for $10,000 worth of stock to be paid for as follows:

"By I. E. Arian, by merchandise of the reasonable value of his $10,000.00 subscription;

"By Jerome Gayne, by the payment of cash for his $10,000.00 worth of stock;

"By Samuel Gayne, by the payment by Trieber in his behalf of merchandise of the value of $6,708.18, and cash in the sum of $3,291.82.

"That he, Trieber, would deliver to said corporation, in payment of his subscription, merchandise of the reasonable value of $8,967.10 and cash in the sum of $1,032.90.

"That said directors, relying upon said representations, and believing the same to be true, did adopt the resolution aforementioned.

"That thereafter and on or about the 22nd day of March 1951, in line with said resolution, and with the full knowledge and consent of the said Trieber, and believing the representations aforementioned of the said Trieber, and in reliance thereon, the officers and directors of said corporation filed an Application for Permit to Sell and Issue Stock, to wit, one hundred (100) shares to each of the persons heretofore named, for Ten Thousand Dollars ($10,000.00), which said stock was paid for as set forth in said resolution aforementioned.

"That thereafter and on the 28th day of March, 1951, the Commissioner of Corporations, State of California, issued a permit for the issuance and the sale of four hundred (400) shares of stock to the said persons named, for the consideration set forth in the resolution aforementioned; that said permit further provided that the stock shall be issued by the 28th day of September, 1951; that said permit further required the appointment of an escrow holder to be approved by the said Commissioner, which escrow holder was to hold the stock issued to the persons aforementioned until the further order of the said Commissioner of Corporations; that no further order of the said Commissioner of Corporations was thereafter made.

"That thereafter the directors of said corporation, with the full knowledge and consent of the said Morris Trieber, and in reliance on the said

representations of the said Trieber, and with the approval of the Commissioner of Corporations, named and designated one Joseph A. Brown, an attorney at law, as said escrow holder; that the resolution appointing the said Joseph A. Brown as said escrow holder was adopted at a special meeting duly and regularly held on the 29th day of March, 1951, and a certified copy thereof was duly filed with the Division of Corporations by the said Morris Trieber as secretary on the 4th day of April, 1951, and said escrow holder was approved by the Commissioner of Corporations on the 6th day of April, 1951.

"That thereafter the said Morris Trieber, on or about the 30th day of April, 1951, represented to the directors and officers of said corporation that he had delivered to the said corporation merchandise of the reasonable value of $15,675.28, being the merchandise hereinabove referred to and delivered to said corporation in payment of stock, as follows:

"$6708.18 against the stock to be issued to Samuel Gayne;

"$8,967.10, in payment of the stock to be issued to Morris Trieber.

"That in reliance upon the said representations of the said Trieber, so made on or about April 30, 1951, and believing the same to be true, the said corporation, on the said 30th day of April, 1951, pursuant to the Permit aforementioned, issued one hundred (100) shares of stock to each of the following named persons, for which stock said persons paid, or in the instance of Morris Trieber and Samuel Gayne, allegedly paid, the consideration therefor:

"I. E. Irian, 100 shares of the par value of $100.00 each, $10,000.00 paid for by the said I. E. Arian in merchandise of the reasonable value of $10,000;

"Jerome R. Gayne, 100 shares of the par value of $100.00 each, for $10,000.00 cash;

"Samuel Gayne, 100 shares of the par value of $100.00 each, in consideration of the alleged delivery to the said corporation in his behalf of merchandise of the reasonable value of $6,708.18, as represented to said corporation by the said Morris Trieber, was delivered by him to said corporation, and cash in the sum of $3,291.82;

"Morris Trieber, 100 shares of the par value of $100.00 each, in consideration of the alleged delivery to said corporation of merchandise of the reasonable value of $8,967.10, as was represented by said Trieber, was by him delivered to said corporation, and cash in the sum of $1,032.90.

"That certificates numbered 1, 2, 3 and 4, respectively, were issued to said parties and delivered to the escrow holder on the 12th day of July, 1951, on behalf of said parties respectively, which escrow holder in turn issued a receipt to each of said parties for his said shares, setting forth that he held said certificates for the said parties, and filed a copy thereof with the Commissioner of Corporations of the State of California.

"That thereafter and within three years last past, the officers and directors of said corporation, other than the said Trieber, for the first time discovered that the representations of the said Trieber made to the said corporate officers and directors as above alleged on or about the 8th

day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, and discovered that said Trieber did not own or control any surplus or other property which was of the value of $15,675.28, or of any value whatsoever; that but for said false and untrue representations, said directors would not have adopted the said resolution so adopted on said day, nor would they have taken the further steps hereinabove outlined as having been taken, before the Division of Corporations of the State of California; that within the three years last past, the said officers and directors of said corporation, for the first time, discovered that the representations of the said Morris Trieber made to the officers and directors of said corporation on or about the 30th day of April, 1951, to the effect that he had delivered to the said corporation merchandise of the fair and reasonable value of $15,675.28 in partial payment of the stock as hereinabove alleged, for which stock was issued to him and Samuel Gayne, were in each and every instance false, fraudulent and untrue, and that the said Morris Trieber did not deliver any merchandise to the said corporation of any value whatsoever, either in payment of any stock issued to him, or in payment of the stock issued to the said Samuel Gayne as aforementioned, and that the said Morris Trieber falsely, fraudulently and wilfully misrepresented to the said corporation the delivery of said merchandise. That the said officers and directors of the said corporation believed said representations to be true and relied thereon, and but for said belief and reliance, would not have issued the stock hereinabove re-

ferred to the said Morris Trieber and/or Samuel Gayne.

"That by reason of the said Morris Trieber's false, fraudulent and wilful misrepresentations as hereinabove set forth, and the reliance thereon by the said corporation's directors and officers, the said corporation and the creditors of said corporation have been damaged in the sum of $15,975.28, plus interest at the rate of seven per cent (7%) per annum on said sum from the 7th day of April, 1951, to date.

"That in doing the things herein alleged, the said Trieber acted wilfully, maliciously and wantonly and has been guilty of oppression, fraud and malice and the said Trieber's acts were in direct violation of the Rules and Regulations and Laws applicable to the sale of corporate stock and the payment therefor, and by reason thereof caused said corporation embarrassment, caused said corporation to issue false and fraudulent statements to creditors and banks, to the further damage of the said corporation in the sum of $10,000.00, and by reason of the foregoing, the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of $15,000.00.

"Wherefore, said Trustee prays that an Order be made and entered disallowing the claim of the said Morris Trieber in the sum of $3,162.24, and the whole thereof, and that no allowance be made for any sum whatsoever on said claim, and for an Order disallowing said claim unless and until said claimant pays to said Trustee the sum of $40,675.28, together with interest at legal rate of $15,675.28 from April 30, 1951, forward, and that

said claimant be ordered to pay said sum to the Trustee herein, together with said Trustee's costs incurred herein, and for such further and different Order as may be just and proper in the premises."

On the same day the Referee issued an order that petitioner appear before him on July 7, 1955, to show cause "why the relief prayed for by the trustee in said objections to the allowance of the claim of Morris Trieber should not be granted. (TR 19.)

On July 20, 1954, the petitioner filed a document entitled, "Answer and return of Morris Trieber to order to show cause and motion to dismiss petition of trustee and to discharge order to show cause for want of jurisdiction." The grounds of motion to dismiss the order to show cause for want of jurisdiction are thus stated in the said answer and return (TR 20):

"That this Honorable Court has not, nor has your Honor as Referee in bankruptcy of said Honorable Court any jurisdiction to hear or determine the petition of said Referee which is annexed to the said order to show cause, or to make any order thereon or to grant any of the relief prayed for by the said Trustee; and in this behalf the said Morris Trieber further shows to your Honor that this proceeding presents a case of a contest between the Trustee in bankruptcy and a third person who is not a party to the bankruptcy proceeding and whose rights, claims and defense cannot be summarily adjudicated by your Honor or by this Honorable Court

in this proceeding; and that it further appears that the aforesaid petition of said referee in bankruptcy is a purported claim against the said Morris Trieber for damages alleged to have been made by said Morris Trieber, and that it is further alleged in Paragraph X of said petition that the said bankrupt corporation suffered additional damages in the sum of $10,000; and that it is further alleged that the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of $15,000; and the said Trustee as the party of said petition prays for an order by your Honor that the said Morris Trieber pay to said Trustee the sum of $40,675.28 together with interest at legal rate of the sum of $15,675.28 from April 30, 1951, forward; that your Honor has no jurisdiction to make any such order, and that this Honorable Court has no jurisdiction to make any such order; that such an order or judgment could be made only if a trial before a court of competent jurisdiction, and after a verdict of a jury duly empaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived; and in this behalf the said Morris Trieber further represents and shows to your Honor that this Honorable Court would in any event have no jurisdiction of any action brought by the said Trustee in bankruptcy to recover said sum or any other sum of money claimed to be due from said Morris Trieber to said bankrupt, by reason of any alleged fraud, or otherwise, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the Court of the State of California whose jurisdiction

cannot be ousted by any order that your Honor might make.

"And for Further Answer and Return to the Said Order to Show Cause and as Further Ground for the Dismissal and Discharge of the Same and for Further Ground of Objection to to the Jurisdiction of this Court to Hear and Determine Any of the Matters and Things Set Forth in the aforesaid Petition of the Said Trustee in Bankruptcy, the said Morris Trieber Alleged and Shows:

"That all and singular the matters and things set forth by the said trustee in bankruptcy as grounds for the order and relief sought herein by the said trustee, and all and singular the claims of the said trustee therein set forth cannot be maintained by said trustee in this proceeding for the reason that the said trustee is barred and precluded from maintaining the same by virtue of a said judgment and order heretofore, to wit, on the 3rd day of August, 1954, duly given, made and entered in and by the Superior Court of the State of California in and for the City and County of San Francisco, and numbered therein 431,888 in which Gayne Sales Co., Inc., a corporation, the bankrupt in this proceeding, was plaintiff and the said Morris Trieber was defendant in which a certain second amended complaint for damages for fraud, breach of contract and money had and received was sustained by said Superior Court without leave to amend; that the said second amended complaint was based upon the same purported cause of action and involved in all respects the said matters and things and all and singular the same claims as

are set forth in the present proceeding by the said Referee in bankruptcy, all of which form the said second amended complaint in the action last aforesaid, a copy of which is hereunto annexed as Exhibit 'A' and made a part hereof, fully and at large appears.

"That a copy of the Minute Order sustaining the said demurrer of the said Morris Trieber to the said complaint of the said Gayne Sales Co., Inc., a corporation, without leave to amend is hereunto annexed and made a part hereof in like manner and with like effect as if heretofore set forth in its entirety.

"And in this behalf the said Morris Trieber further shows to your Honor that thereafter and on the 11th day of August, 1954, the said Gayne Sales Co., Inc., appealed from the order of said Superior Court to the Supreme Court of the State of California from the order of the said Superior Court sustaining the demurrer of the said Morris Trieber to the second amended complaint of Gayne Sales Co., a corporation, the bankrupt therein, without leave to amend; and the said Morris Trieber further shows that thereafter, and prior to the first day of December, 1954, the said Supreme Court of the State of California, in the exercise of the jurisdiction conferred upon it by the Constitution of the State of California, duly transferred the said appeal to the District Court of Appeal of the State of California in and for the First Appellate District, Division Two, and that on the first day of December, 1954, the said Gayne Sales Co., Inc., a corporation, filed in said District Court of Appeal a certain brief, in which the said

corporation sets forth in substance and effect all of the matters and things now set forth in the present proceedings by the said Referee in bankruptcy; that thereafter and on the 20th day of December, 1954, the said Morris Trieber filed in the said District Court of Appeal, a notice of motion to dismiss the said appeal of the said Gayne Sales Co., Inc., from the said order sustaining the said demurrer to the second amended complaint without leave to amend, and filed therewith a Memorandum of Points and Authorities in support of the said motion;

"That thereafter and on the 10th day of January, 1955, the said motion to dismiss the said appeal from the said order of said Superior Court, came on regularly to be heard before the said District Court of Appeal and was argued by counsel; in consideration whereof it was by the said District Court of Appeal, ordered, adjudged and decreed that the said motion be granted and that the said appeal of the said Gayne Sales Co., Inc., be dismissed; and that by reason of all and singular the premises, the said judgment in the aforesaid action of Gayne Sales Co., Inc. v. Morris Trieber, is res judicata as to all and singular the matters before your Honor and before this Honorable Court in the instant cause, and the said Gayne Sales Co., Inc., and its said trustee in bankruptcy are, and each of them is, estopped and concluded from seeking the order prayed for herein and from obtaining any of the relief sought by them or by either of them; and your Honor and this Honorable Court are likewise estopped and precluded from granting any relief in the premises to the said bankrupt or to the said trustee in bankruptcy.

"And for Further Answer and Return to the Said Order to Show Cause Said Morris Trieber Respectfully Shows to Your Honor:

"That the purported cause of action and each and every of the said purported causes of action and any and all matters and things whatsoever set forth herein by the said Trustee in bankruptcy are barred by the Statute of Limitations as set forth in Subdivision 4 in Section 338 of the Code of Civil Procedure of the State of California."

The prayer of the answer and return is that the order to show cause be dismissed and discharged, that the trustee take nothing thereby, and that it be held and considered that the Court has no jurisdiction of the proceeding. (TR 26.)

Annexed to the answer is a copy of a second amended complaint filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and numbered therein 431,888 and entitled Gayne Sales Co., Inc., a corporation, v. Morris Trieber. (TR 26 et seq.)

On January 10, 1956, the referee made an order which, after certain preliminary recitals, reads as follows:

"It hereby is ordered, adjudged and decreed:

"1. That this bankruptcy court has jurisdiction over said Morris Trieber and said subject matter;

"2. That the objection to jurisdiction of said Morris Trieber be, and said objection is, overruled;

"3. That January 30, 1956, be, and said last mentioned date is, hereby fixed for the hearing on the merits of the trustee's said objection and/or the trustee's said petition for turn-over order, and that said hearing, on the merits, be held on said last mentioned date, commencing at the hour of 10:00 o'clock a.m. of said last mentioned day, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, to be postponed and/or continued from time to time thereafter as the circumstances shall warrant." (TR 43, 44.)

On January 13, 1956, the petitioner filed in the District Court a petition for review of the said order of the referee by a judge. (TR 44-45 et seq.) This petition, after setting forth the order of the referee *in haec verba,* assigns seven errors in respect thereto.

The first of these is that neither the Court nor the referee had any jurisdiction to determine the petition of the trustee in bankruptcy, for the reason that the order sought to be reviewed was made in a case of a contest between the trustee in bankruptcy and Trieber, who was not a party to the bankruptcy proceedings, and whose rights, claims and defenses could not be summarily adjudicated by the referee or by the Court.

The second error assigned is that the petition of the referee in bankruptcy sets forth a purported claim for both compensatory and exemplary damages against Trieber, and prays for an order that Trieber pay and turn over to the trustee the sum of $40,675.28,

together with interest at the legal rate in the sum of $15,675.28 from April 30, 1951 forward.

The third error assigned is that neither the Court nor the referee has any jurisdiction to make any such order; "that such an order or judgment could be made only upon a trial before a court of competent jurisdiction, and after verdict of a jury duly impaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived."

The fourth error assigned is that neither the Court nor the referee would have any jurisdiction over such an action, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the Courts of the State of California.

The fifth and sixth grounds set forth the judgment of the state Court in Gayne Sales Co., Inc. v. Trieber, which Trieber's return describes in detail, and the dismissal of the bankrupt corporation's appeal by the District Court of Appeal of the State of California, as *res judicata.*

The seventh ground sets forth that the purported cause of action set forth in the petition of the trustee in bankruptcy against Trieber is barred by the Statute of Limitations of the State of California, as set forth in Subdivision 4 of Section 338 of the California Code of Civil Procedure.

The prayer of the petition is that the order of the referee be reviewed by one of the judges of the Dis-

trict Court, and that the petition of the trustee be dismissed and the order to show cause discharged. (TR 46-52.)

On April 11, 1956, the District Court made an order, which, after certain preliminary recitals, concludes as follows:

> "It appears that the order of the Referee involved here was interlocutory and not final, and that therefore this Court should not review the order. See Collier on Bankruptcy, §3921. Accordingly, the petition for review is hereby dismissed and the cause is remanded to the Referee for a hearing on the merits, reserving to the petitioner all his objections to the jurisdiction of the Referee." (TR 53.)

On April 16, 1956, Trieber appealed to the United States Court of Appeals for the Ninth Circuit from the said order of the District Judge. (TR 54.)

Thereafter, on September 5, 1956, the Court of Appeals granted a motion of respondent to dismiss the said appeal. Petitioner prays certiorari to review the said dismissal.

(f) THE FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

> "The District Courts shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceeds in bankruptcy."
>
> U. S. Code, Title 28, Section 1334.

(g) ARGUMENT OF THE CASE.

The Court of Appeals has rendered a decision in conflict with the decisions of other Courts of appeals on the same matter; and has decided an important question of federal law which has not been, but should be, settled by this Court; and has decided a federal question in a way in conflict with applicable decisions of this Court; and has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision. (Rule 19, Subdivision 1(b).)

SUMMARY OF THE ARGUMENT.

The jurisdiction of the Court of Appeals in bankruptcy matters extends to interlocutory as well as to final orders, and a review should be had in all cases where a substantial right is involved. The petitioner should not be compelled to undergo the delay and expense of a long hearing before the referee, if the bankruptcy Court lacks jurisdiction to grant the demand of the trustee for damages, both compensatory and punitive, in a summary proceeding, thus denying petitioner the constitutional right to a trial by jury. The return of the petitioner to the order to show cause, which is not controverted, shows that the claim of fraud has already been adjudicated by the state Court in a controversy between petitioner and the bankrupt corporation; and shows, moreover, that since the trustee stands in the position of the bank-

rupt, he is barred by the applicable statute of limitations of the State of California.

I.

THE APPELLATE JURISDICTION OF THE COURT OF APPEALS IN BANKRUPTCY PROCEEDINGS INCLUDES INTERLOCUTORY AS WELL AS FINAL ORDERS.

We discuss this subject at the outset because we anticipate a motion by the respondent to dismiss this appeal upon the ground that the order appealed from is an interlocutory and not a final order. We shall proceed to show that, under the plain provisions of the statute, the jurisdiction of the Court of Appeals includes interlocutory orders in bankruptcy:

Section 47, Title 11, U.S.C.A. reads as follows:

> "*Jurisdiction of appellate courts.*
>
> "(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact; *Provided, however,* that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further, That* when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

"(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

It would seem that this language is so clear that he who runs may read; yet its force and effect seems to have been lost sight of in decisions handed down since the amendment of 1938, which ignore that the distinction in the former statute between "proceedings" and "controversies" no longer exists, and that interlocutory as well as final orders are appealable, subject only to the rule that the order must not be of a purely formal or trivial character; in other words, the order must be one which affects substantial rights of the appellant.

Remington (Vol. 8, p. 323), under the heading, "Appealable Orders; in General," thus states the situation as it now exists with respect to appeals from orders in bankruptcy:

"The original provisions of Sections 24-25 of the 1898 bankruptcy act were quite at variance from the present form. It contemplated possible use of a writ of error or of certiorari, as well as appeals in equity; were so phrased as to indicate a distinction between; 'controversies arising in bankruptcy' and 'bankruptcy proceedings'; and

the only expressly appealable orders were (1) a judgment adjudging bankruptcy, (2) a judgment granting or giving a discharge, and (3) a judgment allowing or rejecting a claim of $500 or more. To state that this left things in considerable doubt and uncertainty reflects polite restraint in the use of stronger terms. In certain respects, some of the older decisions still have value, but the majority of them, since the 1926 and 1938 amendment of the sections herein involved, are worthless. It can be said now that appeal lies from *any* order, either interlocutory or final, whether entred in a 'controversy arising in bankruptcy,' or in a 'bankruptcy proceeding,' by which the appellant is aggrieved. *There is no longer any doubt about the appealability of the various and sundry intermediate or interlocutory orders in the course of bankruptcy administration, provided they have actual significance.*"

The provisions of Section 24 of the Bankruptcy Act, as amended in 1938, 11 U.S.C. Sec. 47, in respect of the review by appeal of interlocutory orders in proceedings in bankruptcy, have been applied or invoked in the instances hereinafter noted in which the order in question was expressly characterized by the Court as such an order or has been deemed to be such although not expressly so characterized, with the results stated.

In the following instances, in addition to the others subsequently noted, the order in question has been held or declared appealable, or an appeal therefrom has been entertained:

—An order denying a motion by the debtor to dismiss an involuntary petition in bankruptcy. (*Harris v. Mills Novelty Co.,* 106 Fed. 2d 976; *Theard v. Fidelity & Deposit Co.,* 202 Fed. 2d 880), or for the reorganization of a corporate debtor.

—An order in a reorganization proceeding appointing a person other than a referee as a special master to take testimony and report as to the fairness and reasonableness of a proposed compromise offer, the Court having intimated that if such offer should be accepted and approved the debtor corporation would be returned to the stockholders and the proceeding would be dismissed.

—An order of contempt for failure to produce books of account relating to the business of the bankrupt. (*Robertson v. Berger,* 102 Fed. 2d 530.)

—An order denying the petition of the trustee for an order directing a witness to answer certain questions and produce certain memoranda in an examination under Sec. 21(a) of the Bankruptcy Act, 11 U.S.C. Sec. 44(a) (*Re Bush Terminal Co.,* 105 Fed. 2d 150.)

—An order denying a motion of tax authorities for the dismissal of a petition of the debtor's trustee alleging that taxes assessed against the debtor were excessive and praying that the Court hear and determine the amount and legality of the taxes in question. (*Arkansas Corp. Commission v. Thompson,* 116 Fed. 2d 179, reversed on other grounds, 313 U.S. 132, 85 L.Ed. 1244, 61 S.Ct. 888.)

—An order denying the motion of a creditor to withdraw a claim previously filed by it in the bankruptcy proceeding. (*Kelso v. Maclaren,* 122 Fed. 2d 867.)

—An order denying the motion of a creditor, against whom a counter claim had been filed by the trustee, for the dismissal of the counter claim, insofar as it exceeded the amount of the creditor's claim, on the ground that the Court was without jurisdiction of the creditor by reason of his nonresidence and the lack of service of process. (*Columbia Foundry Co. v. Lochner,* 179 Fed. 2d 630, 14 A.L.R. 2d 1349.)

—An order in a reorganization proceeding refusing to recognize a state Court judgment obtained against the debtor on a claim for damages for a personal injury sustained after the institution of the proceeding as proof of such claim and remanding the claim to the master for hearing on the merits. (*In re Chicago & E.I.R. Co.,* 121 Fed. 2d 785, certiorari denied, 314 U.S. 653, 86 L.Ed. 523, 62 S.Ct. 102.)

—An order requiring the referee to furnish to a creditor a transcript of testimony taken in an examination under Section 21a of the Bankruptcy Act. (*In re Winton Shirt Corp.,* 104 Fed. 2d 777.)

—An order in a reorganization proceeding impounding the list of the debtor's creditors and stockholders and providing that use of the list for the purpose of sending communications to security holders should be permitted only separate applications to the Court to authorize specific communications. (*Delatour v. Meredit,* 144 Fed. 2d 594.)

—An order approving an order of the referee instructing the trustee not to pay a sum required to extend the bankrupt's leasehold interest in property occupied by it. (*R. J. Rosen & Sons, Inc.,* 130 Fed. 2d 81.)

—An order in a reorganization proceeding authorizing the sale by the trustee of certain real property alleged to belong to the debtor. (*Hoehn v. McIntosh,* 110 Fed. 2d 199.)

—An order in a proceeding under Section 75 of the Bankruptcy Act, 11 U.S.C. Sec. 203, denying a motion of creditors of the debtor for leave to forclose their mortgages. (*Federal Land Bank v. Hansen,* 113 Fed. 2d 82.)

—An order denying the bankrupt's motion to complete the record upon the referee's refusal to transmit to the Court, on review of his order denying a discharge, copies of motion before referee to vacate his findings and documents attached thereto as exhibits. (*In re Leigh,* 139 Fed. 2d 386.)

—An order affirming the action of the referee in sustaining the exceptions of the bankrupt to a portion of a creditor's specifications of objections to her discharge and overruling others. (*Morris Plan Industrial Bank v. Schorn,* 135 Fed. 2d 538.)

In the case of *In re Leigh,* 139 Fed. 2d 386, the referee in bankruptcy made findings indicating that he would deny the discharge of the bankrupt on the ground that he had failed to keep proper financial records. The bankrupt moved to vacate these findings,

which motion was denied by the referee. The bankrupt then filed a timely petition for review of the order, and the referee refused to transmit to the District Court either a copy of the motion or copies of certain Court records which were attached to them. The bankrupt moved for a completion of the record in the District Court. This motion was denied and an appeal was taken to the United States Court of Appeals for the District of Columbia. At page 387, that Court, reversing the District Court, uses the following language:

> "Courts have refused appeals from interlocutory orders in bankruptcy which are trivial in their effect on the proceedings, but this is not the case here. A bankrupt who seeks a review of an order on a motion is entitled to have the court consider the motion papers and all the exhibits as they were presented to the referee, and this is a *substantial right.*"

The Court, while holding that the petitioner had misconceived his remedy in seeking a special appeal and that it must look to the bankruptcy act for its jurisdiction, states:

> "*That act authorized an appeal of right from all bankruptcy orders, interlocutory as well as final,* except where money alone is involved and the amount is less than $500."

The Court proceeds to state, however, that it would not be in the interest of justice to dismiss a special appeal merely to have it presented again in different form, and that it would "take jurisdiction of this case on the papers before us as an *appeal of right.*"

The limitation on the right to appeal from interlocutory orders is thus stated in *Federal Land Bank v. Hansen,* 113 Fed. 2d 82, by the Circuit Court of Appeals of the Second Circuit:

> "Appeals should be dismissed only when the court has no jurisdiction to review any aspect of the action taken below. When the order below is re-examined, even to the limited extent of determining whether or not the discretion of the District Court has been abused, the appellate court exercises its appellate jurisdiction, and affirmance or reversal would appear to be required. The present order was an interlocutory one. *Even in bankruptcy,* various interlocutory orders which determine nothing, such as orders merely of reference for report, are not reviewable and appeals will be accordingly dismissed. Other interlocutory orders are reviewable for abuse of discretion alone. Appeals from such orders have occasionally been dismissed, but we believe it is better practice to affirm if no abuse of discretion is shown (citing cases)."

We have emphasized the phrase "even in bankruptcy" in the foregoing quotation because it is obvious that the Court recognizes that, in contract with appeals generally, in which review is limited to final judgments or decrees, appeals in bankruptcy run from interlocutory orders. This, of course, is in conformity with the plain provisions of the statute as it now stands.

In the case of *Pearson v. Higgins,* 34 Fed. 2d 27, in which the Circuit Court of Appeals of the Ninth Circuit held that an order of the District Court

denying review of a referee's determination that the bankruptcy Court had jurisdiction in a summary proceeding, was not an appealable order, is no longer the law, in view of the amendments to the sections of the act relating to appeals.

It is remarkable that, on the Ninth Circuit as late as 1949, it was held that an interlocutory order in a "controversy" in bankruptcy, as distinguished from a "proceeding" in bankruptcy was not appealable, despite the fact that subdivision (a) of Section 47 specifically authorizes appeals both in "controversies" and in "proceedings." It is quite obvious that the Court relied upon decisions prior to the amendment of 1938 and that the drastic and sweeping changes in the law were not called to the attention of the Court.

In *Goldie v. Carr,* 116 Fed. 2d 325, the Court of Appeals of the Ninth Circuit dismissed an appeal from an order overruling defendant's objection to the jurisdiction of the bankruptcy Court to compel the appellant to turn over certain corporate shares and moneys alleged to be held in trust for the debtor's estate. The Court says that the order was plainly interlocutory in character and that no turnover order had been made. In regard to the amendment of June 22, 1938, embodied in the Chandler Act, the Court says that Act—the controlling law here—does not make an interlocutory order in a controversy in bankruptcy appealable. This language directly contradicts the plain provisions of Section 47(a) itself, which makes interlocutory orders appealable whether made

in a *controversy* in bankruptcy or in a *proceeding* in bankruptcy. It is submitted that this language must have been inadvertently used, and that the Court, in spite of its reference to the amendment, relied upon decisions prior to its adoption. This is clear from the fact that in support of the statement it cites *Pearson v. Higgins,* supra; *In re Federal Photo Engraving Corp.,* 54 Fed. 2d 628, and *Lieberman v. Bankcroft,* 59 Fed, 2d 202, all of which were decided prior to the effective date of the 1938 amendment.

In *Arkansas Corporation Commission v. Thompson,* 116 Fed. 2d 179, in which the Commission appealed from an interlocutory order denying its motion to dismiss a proceeding brought by the trustee, which alleged that the property of the railroad had been assessed in excess of its fair market value, the Circuit Court of Appeals of the Eighth Circuit says:

> "In limine the trustee has presented that this court should decline to maintain this appeal because the order appealed from is a proceeding in bankruptcy and is manifestly interlocutory and is not conclusive of the merits of the controversy between the trustee and the Arkansas tax authorities. But we conclude that the appeal is authorized by the provisions of Section 24, subdivisions a, b of the Bankruptcy Act as amended June 22, 1938, 52 Stat. 854, 855, 11 U.S.C.A. Sec. 47, Subs. a, b, and decline to dismiss it."

In *Cohen v. Eleven West 42d Street, Inc.,* 115 Fed. 2d 531, the Circuit Court of Appeals of the Second

Circuit, reversing an order denying a motion for a summary judgment, says at page 533:

> "The appellee suggests that the order, being interlocutory, is not appealable. In an action that would of course be true, for it merely refuses to dispose of the case without a trial (*In re Finkelstein,* 102 Fed. 2d 688; *Jonse v. St. Paul F. & Ins. Co.,* 108 Fed. 2d 123, 125). But in bankruptcy, interlocutory orders are in general appealable. (*Robertson v. Berger,* 102 Fed. 2d 530; *In re Winton Shirt Corp.,* 104 Fed. 2d 777.) And this was not an example of that class of orders which are *merely* incidents in an inquiry pending in the District Court (*In re Hotel Governor Clinton,* 107 Fed. 2d 398, 399)."

In *Columbia Foundry Co. v. Lochner,* 179 Fed. 2d 630, 14 A.L.R. 2d 1349, the law of appeals from interlocutory orders in bankruptcy is very aptly summarized by Judge Soper of the Fourth Circuit in the following language:

> "It is urged upon us that this appeal should be dismissed as premature since it relates only to the jurisdiction of the court to render an affirmative judgment against the creditor and does not represent a final judgment in which the rights of the parties are determined. Section 24, sub. a, 11 USCA Sec. 47, sub a, of the Bankruptcy Act provides that the Circuit Courts of Appeals are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy. Since the appeal in the instant case is from an interlocutory order,

it is premature unless it was entered in a proceeding in bankruptcy. Although the line of demarcation between proceedings and controversies is uncertain, it is generally accepted that questions between bankrupt and his creditors, such as is presented in the instant case, fall into the category of proceedings in bankruptcy. *Matter of National Finance & Mortgage Corp.*, 9 Cir. 96 F 2d 74; *Broders v. Lage*, 8 Cir. 25 F 2d 299; *Morehouse v. Pacific Hardware & Steel Co.*, 9 Cir. 177 F 337; *Collier on Bankruptcy*, 14th Ed., Vol. 2, Sec. 24.12.

"The appeal under Section 24, sub a, from an interlocutory order involving $500 or more in a proceeding in bankruptcy is generally one of right; but the decision limit the appeal to interlocutory orders which have the character of a formal exercise of judicial power affecting the asserted rights of a party and an appeal from an interlocutory order involving the exercise of the trial court's discretion is allowed only upon a showing of an abuse of discretion. See *Collier on Bankruptcy*, supra, Secs. 24.11, 24.39. Clearly due regard for the efficiency and dispatch of bankruptcy proceedings requires that the right of appeal from interlocutory orders under Section 24, sub a, be kept within reasonable bounds.

"However, even prior to the enactment of Section 24, sub a, an interlocutory order overruling an objection to jurisdiction had been held appealable. *In re Margolies*, 2 Cir. 266 F 203; see *In re Hotel Governor Clinton, Inc.*, 2 Cir. 107 F 2d 398, 399. It is our view that in consideration of the importance of the question involved, the appeal in this case should be entertained, and the motion to dismiss is therefore denied."

II.

NEITHER THE REFEREE NOR THE DISTRICT COURT IN BANKRUPTCY HAS ANY JURISDICTION TO MAKE THE ORDER SOUGHT BY THE TRUSTEE, OR TO HEAR OR DETERMINE HIS CLAIM FOR DAMAGES OR, MORE PARTICULARLY, TO MAKE THE "TURNOVER" ORDER PRAYED FOR.

A Court of Bankruptcy Has No Jurisdiction to Try a Controversy Between the Trustee and One Not a Party to the Proceeding; and Even the District Court May Not, in the Exercise of Its Law or Equity Jurisdiction, Hear and Determine Such a Suit in the Absence of Diversity of Citizenship.

The law has been well settled for many years by well-considered decisions of the Supreme Court of the United States that a referee in bankruptcy, and the District Court sitting in bankruptcy proceedings, have no jurisdiction to try title to property claimed adversely by one not a party to the bankruptcy proceedings. In other words, such a question of title cannot summarily tried in the absence of the consent of the defendant, unless he appears in the Bankruptcy Court and consents to have his title tried in that manner.

> *Weidhorn v. Levy,* 253 U.S. 268; 40 S.Ct. 534; *Harris v. First National Bank,* 216 U.S. 382, 30 S.Ct. 296, 54 L.Ed 528.

The jurisdictional point that we make is not merely that the referee in bankruptcy has no jurisdiction to try and determine adverse claims in the *bankruptcy proceeding;* But

The Federal Court itself would have no jurisdiction over a suit (which formerly would have been on the equity side) brought by the trustee to recover property claimed to belong to the bankrupt or over any

suit to recover damages *ex contractu* or *ex delicto* against a third party who denied the claim, in the absence of a showing of diversity of citizenship.

We may add that the language used in some of the decisions as to consent is seriously questionable, because of the universal rule that the *party cannot, by consent,* give a Court, as such, jurisdiction in a matter which is excluded by the laws of the land.

Thus in *Kaigler v. Gibson,* 264 Fed. 240, it is said that *"a trustee cannot sue in a Federal Court where there is no diversity of citizenship and no Federal question,* unless he brings the case within one of the exceptions."

It is also added:

> "It may be doubted whether the consent of the defendant mentioned above (referring to a section of the Bankruptcy Act) extends further than to a question of venue, which may be waived. As a general rule, Federal jurisdiction, properly so-called, cannot be so conferred. *Minnesota v. Northern Securities Co.,* 194 U.S. 43."

And the Supreme Court in *Lovell v. Newman,* 227 U.S. 412, 33 S.Ct. 375, says that the consent provided for in the act "certainly was not intended to enlarge the jurisdiction of the Circuit Court of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy, or by reason of a cause of action arising under the constitutional laws of the United States."

In any event, the entire question of jurisdiction was set at rest as long ago as January 14, 1929, in a brief *per curiam* decision by the Supreme Court of the United States in *State Trust & Savings Bank v. Dunne,* 278 U.S. 582, 73 L.Ed. 518, 49 S.Ct. 184.

To understand that decision it is necessary to examine the opinion of the Circuit Court of Appeals in the same case (24 Fed. 2d 477). A trustee in bankruptcy, to use the language of the Circuit Court of Appeals for the Fifth Circuit, "brought suit to recover certain collaterals, alleged title to same to be in him as trustee, and also avering that they had been transferred by the bankrupt within four months prior to the filing of the petition with intent and purpose on its part to hinder, delay and defraud its creditors in violation of the provisions of Section 67e of the Bankrupt Act. In the alternative the bill prayed for an accounting and for recovery of the value of the collaterals, less any amount found to be due appellant."

The District Court rendered a decree or judgment in favor of the plaintiff, and this was affirmed by the Circuit Court of Appeals, which said in part:

> "It is contended by appellant that the District Court was without jurisdiction. The allegations of the bill were sufficient to show a cause of action arising under section 67e of the Bankruptcy Act. We must put aside consideration of the merits as to that part of the bill, not as being without substance, but as unnecessary to be decided. The asserted ground of jurisdiction required the District Court to take jurisdiction

initially and have done so, to decide the equities of the case."

A petition for a writ of certiorari was filed with the Supreme Court of the United States, and on January 14, 1929, the Court said:

> "*Per curiam:* Reversed, for the reason that there is no Federal jurisdiction over the cause. (*Wood v. A. Wilbert's Shingle & Lumber Co.,* 226 U.S. 384, 57 L.Ed. 264, 33 S.Ct. Rep. 125; *Weidhorn v. Levy,* 253 U.S. 268, 64 L.Ed. 898, 40 S.Ct. Rep. 534; *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U.S. 426, 68 L.Ed. 770, 44 S.Ct. Rep. 396.)"

III.

NEITHER THE REFEREE NOR THE DISTRICT COURT HAD ANY JURISDICTION TO MAKE THE "TURN-OVER" ORDER SOUGHT BY THE TRUSTEE.

The effect of this order would not merely mean that a summary judgment would be rendered against Trieber without a trial, by jury or otherwise, but also that he would be ordered to pay the entire amount claimed as damages by the trustee, and that if he refused to do so he could be attached and punished for contempt of Court, and ordered to stand committed until he paid to the trustee the entire amount claimed, both as compensatory and as punitive damages.

This, as we heretofore stated, is indeed something novel in the law. It harks back to the horrors of the debtors' prison and the infamies of the Wardens of the Fleet, described so vividly by the Earl of Birkenhead in his work on "Celebrated Criminal Trials."

The vice of the preceding attempt in the case at bar is clearly pointed out by Justice McReynolds in *Daniel v. Guaranty Trust Co. of New York,* 285 U.S. 154, 52 S.Ct. 326, 78 L.Ed. 675:

> "In the circumstances, would the referee have jurisdiction to enter the turnover order against the Trust Company? The answer must be 'No' unless that company, by filing its petition for reclamation entered its general appearance and in effect consented to submit itself to summary proceedings before that officer in respect of matters having no immediate relationship to the claim which it had presented.
>
> "In practice, such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily enter where the right to recover is clear. Moreover, the choice would not be between tribunals merely but between the ordinary process in a plenary suit and a summary hearing. We are not cited to any opinion by an appellate court which definitely approves the view advanced by the petitioner. We cannot conclude that the demand for speedy administration of the bankrupt estates is enough to justify such a radical departure from ordinary procedure. And the suggestion that it is possible to impose equitable terms as a condition to an order of reclamation is not helpful."

It is, indeed, something new to ask a Court to order a litigant, under the pains and penalties of contempt, to pay both compensatory and punitive damages to his adversary.

We again submit that neither the Referee nor the District Court could make any such order.

> "Jurisdiction in summary proceedings, being of statutory authority, and based upon necessity to prevent threatened loss to the rightful owners of property, or defiant disobedience to the orders and decrees of courts, should not be enlarged by construction or implication."
>
> *In re Cox-Rackley Co.,* 245 Fed. 376.

We shall proceed to show that the order sought by the trustee will issue only in cases in which the adverse party is actually in the possession of property belonging to the bankrupt estate, or where the summary process is used "to recover possession of property which has been in the Court's possession and has been wrongfully taken away."

Chandler v. Perry, 74 Fed. 2d 371.

In *Maggio v. Zeitz,* 333 U.S. 56, 68 S.Ct. 401, 82 L.Ed. 476, the Supreme Court unanimously reversed a commitment for contempt of Court for failure to comply with a "turnover" order which had been affirmed by the Circuit Court of Appeals (157 Fed. 2d 951).

At 68 S.Ct. 405, Mr. Justice Jackson, who delivered the opinion of the majority of the Court, says of a "turnover" order:

> "But this procedure is one primarily *to get at property rather than to get at a debtor.* Without pushing the analogy too far, it may be said that the theoretical basis for this remedy is found in the common law actions to recover possession—

detinue for the unlawful detention of chattels and replevin for their unlawful taking—as distinguished from actions in trespass or trover *to recover damages* for the withholding or for the value of the property. Of course the modern remedy does not follow any of these ancient and often overlapping procedures, but the object—*possession of specific property*—is the same. The order for possession may extend to proceeds of property that has been disposed of, if they are sufficiently identified as such. But it is essentially a proceeding for *restitution* rather than indemnification, with some characteristics of a proceeding in rem; the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for *damages* for tortious conduct such as embezzlement, misappropriations, or improvident dissipation of assets."

In no other case is the injustice and absurdity of such proceedings as the one at bar stated more forcibly than by the Circuit Court of Appeals of the Second Circuit in the case of *In re Luma Camera Service,* 157 Fed. 2d 951:

> *"We would hold that a turn over proceeding may not, via a fiction be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury.* We would note, too, that one consequence of the fiction is that the respondent may be twice punished for the same offense, since, if he later is indicted for violation of 11 U.S.C.A. Section 52, sub b, his imprisonment for contempt will not serve as a

> defense. We would add that nowhere in the Bankruptcy Act has Congress even intimated an intention to authorize such results, and that they stem solely from a judge-made gloss on the statute." (Emphasis by the Court.)

In *Cline v. Kaplan,* 323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97, it is said at page 155 of 65 S.Ct.:

> "If the property is not in the court's possession and a third party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.'"

In support of this statement, Justice Frankfurter cites *Galbraith v. Vallely,* 256 U.S. 46, 41 S.Ct. 415, 65 L.Ed. 823 and *Taubel-Scott-Kitzmiller Co. v. Fox,* supra.

It is further held that:

> "Consent (to proceed summarily) is wanting where the claimant has throughout resisted the petition for a turn over order and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a formal order.

We further call the attention of the Court to the very learned and exhaustive opinion of Judge Sanborn of the Eighth Circuit in the case of *In re Rathman,* 183 Fed. 913, which has often been cited with approval, it having been said in a later decision that "Judge Sanborn reviews all of the decisions and discusses exhaustively the cases in which a summary

proceeding may be resorted to." (*In re Cox-Rackley Co.,* 245 Fed. 367.)

Space forbids lengthy quotation from the *Rathman* case. It is sufficient to say that he prefaces his discussion with the statement that the trustee may not escape "from the declarations of the Supreme Court that the jurisdiction of the Bankruptcy Court summarily to determine claims to lien upon and title to property claimed as that of the bankrupt arises out of its actual possession of the property (citing cases) and is exclusive of all other grounds because the actual possession draws to it the legal custody of the property (etc.)."

An outstanding decision which specifically holds that money or the property of the bankrupt estate, not in the actual or constructive possession or control of the trustee, are not subject to the summary jurisdiction of the Bankruptcy Court, and cannot be recovered by a "turn over" order, is *In re Joslyn's Estate,* 168 Fed. 2d 803, in which the Circuit Court of Appeals for the Seventh Circuit says, at page 806:

> "The law is well established that a Bankruptcy Court does not have summary jurisdiction over a turnover proceeding to recover an alleged indebtedness due from a third party to the bankrupt estate, or on property rights claimed by an adverse party who is in possession and makes timely objections to the summary jurisdiction."

In *Dwyer v. Franklin,* 227 Fed. 2d 152, decided January 2, 1956, the Court of Appeals of the Seventh Circuit, holds (we quote the syllabi in the Pacific

Reporter in lieu of quotation from the decision itself):

"1. Though filing a claim in Bankruptcy Court is an implied consent to summary adjudication by that court of any counter-claims based upon the subject matter of that claim, it is not an implied consent to summary adjudication in Bankruptcy Court of a counterclaim arising out of subject matter which has no relation to that claim. Bankr. Act, Paras. 2, sub. a(7), 23, subs. a, b, 60, 67, 70 and sub. e, 11 U.S.C.A., Paras. 11, sub. a(7) 46, subs. a, b, 96, 107, 110 and sub. e.

"2. Where former director of bankrupt corporation filed claim for goods sold bankrupt, and trustees asserted counterclaim based on breach of claimant's fiduciary duty as director, bankruptcy court did not have jurisdiction to determine counterclaim in absence of consent of claimant which could not be implied from filing of claim. Bankr. Act, Paras. 2, sub. a(7) 23, subs. a, b, 60, 67, 70 and sub. e, 101-267, 301-399, 11 U.S.C.A. Paras. 11, sub. a(7), 46, subs. a, b, 96, 107, 110 and sub. e, 501-676, 701-799.

"3. Trustees' unliquidated claim for damages against creditor, and creditor's claim against bankrupt for goods sold were not 'mutual debts,' within provision of Bankruptcy Act authorizing the setoff of mutual debts. Bankr. Act, Para. 68, sub. a, 11 U.S.C.A. Para. 108, sub. a.

"4. The phrase 'account stated' in provision of Bankruptcy Act authorizing the setoff of mutual debts between a creditor and a bankrupt means an agreement between the parties to an account based upon prior transactions between

them, and does not authorize trustee to setoff or counterclaim an unrelated, unliquidated claim for damages against creditor's claim for goods sold and delivered to bankrupt. Bankr. Act, Sec. 68, sub. a, 11 U.S.C.A. Sec. 108, sub. a."

IV.

THE PURPORTED CLAIM FOR AFFIRMATIVE RELIEF BY THE TRUSTEE IS BARRED BY THE STATUTE OF LIMITATIONS.

The separate defense of the trustee, shows upon its face that the alleged fraudulent representations alleged to have been made by Morris Trieber to the officers and directors of the bankrupt corporation were made on April 30, 1951, and that the stock certificates alleged to have been issued to Trieber and others were issued on the same day. The trustee's so-called "Separate and Distinct Defense", which is in reality in the nature of a cross-complaint, was not filed until June 20, 1955, or more than four years after the date on which the fraud was alleged to have been committed and consummated.

Thus, the claim of the referee for affirmative relief is clearly barred by the statute of limitations unless the party who alleges the fraud has pleaded himself out of the statute by a proper allegation of nondiscovery. The only attempt made by the referee in that behalf is in paragraph IX of the Separate Defense and is as follows:

> "That thereafter and within three years last past, the officers and directors of said corporation, other than the said Trieber, for the first time

discovered that the representations of the said Trieber, made to the said corporate officers and directors as above alleged on or about the 8th day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, etc."

There is no allegation anywhere in this pleading of the facts and circumstances which led to the discovery, or why the discovery was not made sooner, or that the discovery could not have been made within the statutory period by the exercise of reasonable diligence on the part of the corporation or its officers.

The naked allegation that fraud was not discovered until within three years prior to the filing of the suit has been held utterly insufficient in a long line of California cases.

Watkins v. Bryant, 91 Cal. 492, 27 Pac. 775;

Lake Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 Pac. 809;

Wilmans v. Weissman, 38 C.A. 693, 102 Pac. 2d 382;

Vertex Investment Company v. Schwabacher, 57 C.A. 2d 406, 134 Pac. 2d 891;

West v. Great Western Power Co., 36 C.A. 2d 403, 97 Pac. 2d 1014.

A complaint alleging only that the falsity of representations was not discovered until a certain date was insufficient.

Sacramento Suburban Fruit Lands Co. v. Lindquist, 39 Fed. 2d 900. (Certiorari denied by the Supreme Court of the United States, 282 U.S. 853, 51 S.Ct. 31, 75 L.Ed. 756.)

See to the same effect:

Sides v. Sides, 119 C.A. 2d 349, 259 Pac. 2d 708;
Cragge v. White, 113 C.A. 2d 356, 248 Pac. 2d 193;
Lewis v. Security-First National Bank of Los Angeles, 58 C.A. 2d 827, 137 Pac. 2d 864;
Seeger v. Odell, 18 Cal. 2d 409, 115 Pac. 2d 977, 136 A.L.R. 1291;
Jackson v. Master Holding Corp., 16 Cal. 2d 824, 108 Pac. 2d 673;
Gibson v. Rath, 13 C.A. 2d 40, 55 Pac. 2d 1219.

It would be like carrying coals to Newcastle to cite further decisions in support of a rule so long and so well settled. The allegation of the trustee's claim heretofore quoted is wholly insufficient to avoid the bar of the statute of limitations and, accordingly, the referee obviously had no jurisdiction to proceed to hear and determine a claim outlawed upon its face.

V.

THE PROCEEDINGS BY THE TRUSTEE ARE BARRED BY THE FINAL JUDGMENT OF THE STATE COURT IN AN ACTION BETWEEN THE BANKRUPT AND TRIEBER WHICH WAS AN ACTION BETWEEN THE SAME PARTIES FOR THE SAME CAUSE.

The complaint filed in the action in the state Court is set forth in *haec verba* as an exhibit to the return of Trieber to the order to show cause. (T.R. 26-41.)

The separate defense of the trustee, claiming damages and demanding the turnover of $40,675.28 to the trustee appears at pages 9 to 18 of the Transcript.

Let us consider, at the outset, the allegations of the two pleadings as they stand side by side.

Paragraphs I and II of each set forth the corporate capacity of the bankrupt corporation, Gayne Sales Co., Inc. and the fact that it was originally organized as Arian Gayne and Associates.

Paragraph III sets forth the names of the incorporators, to wit, I. E. Arian, Jerome R. Gayne and Samuel Gayne, and states that at all the times referred to the incorporators were directors of the corporation and that Trieber was also a director.

Paragraph IV of the Trustee's defense is identical with Paragraph VI of the Second Amended Complaint. The only distinction between the two documents at this juncture is in the order in which they are set forth.

The resolution referred to in paragraph VI of the Second Amended Complaint is preceded by allegations as to certain representations alleged to have been made by Trieber at the meeting at which the resolution was adopted; whereas, in the trustee's defense, the alleged representations are set forth after the resolution.

To state the matter otherwise—in one pleading it is set forth that the directors of the corporation adopted a resolution and that the resolution was adopted because of alleged representations made by Trieber; in the other, it is alleged that Trieber made the representations and that the resolution was adopted in reliance thereon. They certainly stand not upon the order of their going.

Paragraph VI of the trustee's defense and paragraph VII of the complaint both recite the filing of an application for the issuance of 400 shares with the Commissioner of Corporations and paragraph VII of the trustee's defense and paragraph VIII of the second amended complaint each recite the approval of the application by the Commissioner.

We may add that paragraph VII of the defense and paragraph IX of the second amended complaint each contains allegations that Joseph A. Brown was appointed escrow holder for all of the stock to be issued by the corporation and that this appointment was approved by the Commissioner.

In paragraph VIII of the first and paragraph X of the second pleading, there are recitals that on or about the 30th day of April Trieber represented to the directors and officers of the corporation that he had delivered to the said corporation merchandise of a reasonable value of $15,675.28, $6,708.18 against the stock to be issued to Samuel Gayne, and $8,967.10 in payment of the stock to be issued to Morris Trieber and that in reliance upon the said representations the corporation issued certain shares of stock to the persons therein named. The numbers of these certificates are set forth in each of the pleadings.

In paragraph IX of the defense and paragraph XI of the complaint, there are allegations to the effect that the representations made by Trieber were false, fraudulent and untrue and there is in the trustee's defense the naked allegations, repeatedly held to be insufficient (see *Lady Washington Consolidated Gold*

Mining Co. v. Wood, 113 Cal. 482; *Galusha v. Fraser,* 178 Cal. 653; *Original Mining and Milling Co. v. Casad,* 210 Cal. 71; *Mortimer v. Loynes,* 74 C.A. 2d 160, and other decisions heretofore cited), that the discovery of the falsity of the representations was made within three years prior to the commencement of the action. Then in each case follow allegations of actual and punitive damages.

How any factual distinction can be drawn between the allegations of the two pleadings beggars our comprehension.

The law is well settled in California that a judgment of dismissal on the sustaining of a demurrer is *res judicata* on the identical factual issues. This rule is stated in the quite recent case of *Keidatz v. Albany,* 39 Cal. 2d 826, 249 Pac. 2d 264. This has apparently been the law ever since *Robinson v. Howard,* 5 Cal. 429, decided in 1855, in which it is stated by Justice Heydenfeldt that a judgment upon demurrer is a bar to subsequent action "when it determines the whole merit of the case," and the opinion proceeds to say:

> "Here the averment of the answer shows that the demurrer went to the validity of the contract which gave rise to the claim, and this averment is found to be true as alleged, by the judge at *nisi prius,* upon inspecting the record of the case."

The same rules are stated with extensive discussion of authorities in *Goodard v. Security Title Insurance and Guarantee Co.,* 14 Cal. 2d 47, commencing at page 51, in which it is stated that a judgment given after

the sustaining of a general demurrer on a ground of substance may be deemed a judgment on the merits and conclusive in a subsequent suit.

In *Erganian v. Brightman,* 13 C.A.2d 696, 57 Pac. 2d 971, the Court says at page 700:

> "A judgment upon an order sustaining a demurrer constitutes a trial on the merits when an issue of law raised by the demurrer is heard and ruled upon by the court. If leave to amend is granted, it must be taken advantage of, and if it is not, a plaintiff finds himself in the same position as if a demurrer were sustained without leave to amend."

In the paragraph preceding this language the Court says:

> "And a judgment upon the sustaining of a demurrer to the complaint for failure to state a cause of action is a bar to a subsequent action setting up the same facts."

In *Freeze v. Salot,* 122 C.A. 2d. 561, 266 Pac. 2d 140 (hearing denied by the Supreme Court), affirming a judgment entered on an order sustaining a demurrer without leave to amend, the Court said that in determining the validity of a plea in *res judicata* the pertinent question is whether the issue decided in the prior adjudication was identical with the one presented in the action in question.

In the recent case of *Crowley v. Modern Faucet Manufacturing Co.,* 44 Cal. 2d 321, 282 Pac. 2d

33, the Supreme Court affirmed a judgment dismissing an action upon the ground that a prior judgment sustaining a demurrer without leave to amend was *res judicata* and that the plaintiff "was in fact seeking to relitigate the precise issue that was finally adjudicated against him in the former action," and thus that "the trial Court properly exercised its power to stop vexatious litigation, clearly without merit, and burdensome to the Courts as well as to defendants."

Wherefore, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Judges of the United States Court of Appeals for the Ninth Circuit, commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause therein depending, entitled Morris Trieber, Appellant, v. John O. England, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt, Appellee, and numbered in said United States Court of Appeals 15,134, that the judgment of said Court of Appeals may be reviewed by Your Honors and the judgment aforesaid reversed; and that the cause aforesaid be remanded to the said Court of Appeals with direction to do and cause to be done what of right, and according to the laws and customs of the United States ought to be done; and that your petitioner have such other and further judgment, order or relief as to Your Honors shall seem meet,

just and proper in the premises; and thus your petitioner will ever pray.

Dated, San Francisco, California,
November 1, 1956.

MORRIS TRIEBER,
Petitioner in Propria Persona.

JOSEPH A. BROWN,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

MORRIS TRIEBER, *Appellant,* vs. JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt, *Appellee.*	No. 15,134 Sept. 5, 1956

Motion to dismiss the appeal.

Before: Denman, Chief Judge, Stephens and Hamley, Circuit Judges.

PER CURIAM:

Trieber objected to the summary jurisdiction of the bankruptcy referee to hear the trustee's petition for a turnover order. After a hearing on only the question of jurisdiction, the referee overruled Trieber's objection, and assumed jurisdiction to hear the petition on the merits. Trieber filed a petition in the district court to review the referee's order. The trustee moved to dismiss this petition, on the ground that the order of the referee was interlocutory and not final. The district court granted the motion to

dismiss, and remanded the cause to the referee for a hearing on the merits.

Trieber thereupon appealed to this court. The trustee has moved to dismiss the appeal, on the ground that this court lacks jurisdiction. Trieber argues that an interlocutory order made in a "controversy arising in proceedings in bankruptcy," as distinguished from an order made in "proceedings in bankruptcy," is not reviewable, citing 11 U.S.C.A. § 47 (a). It is asserted that this is such an order.

We agree. The order was entered in connection with a dispute between the trustee and an adverse claimant, concerning the right and title to the bankrupt estate. It was therefore an order made in a controversy arising in proceedings in bankruptcy, as that term is used in 11 U.S.C.A. § 47 (a). See *In re Christ's Church of the Golden Rule,* 172 F. (2d) 523. The order is concededly interlocutory in nature. It follows that this court lacks jurisdiction to review such order. *In re Christ's Church of the Golden Rule, supra.*

The motion to dismiss the appeal is ordered granted.

(Endorsed:) Per Curiam Opinion. Filed Sept. 5, 1956. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

MORRIS TRIEBER, *Appellant,* vs. JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt, *Appellee.*	No. 15,134

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Northern District of California, Southern Division, and on motion of Appellee to dismiss the appeal herein, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed.

(Endorsed) Judgment

Filed and Entered: September 5, 1956

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, October 8, 1956
Before: Denman, Chief Judge, Stephens and Hamley, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed October 1, 1956, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

Office - Supreme Court
FILED
DEC 7 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 555

In the Matter of
GAYNE SALES CO., INC., a corporation,
Bankrupt.

MORRIS TRIEBER,
Petitioner,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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In the Supreme Court
OF THE
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OCTOBER TERM, 1956

No. 555

In the Matter of
GAYNE SALES CO., INC., a corporation,
Bankrupt.

MORRIS TRIEBER,
Petitioner,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Morris Trieber has filed a petition requesting that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, which judgment, affirming an order of the

United States District Court for the Northern District of California, Southern Division, was entered on September 5, 1956. A petition for rehearing was denied on October 8th, 1956. The opinion of the Court of Appeals is reported in 237 Fed. 2d 117, and appears in Commerce Clearing House, Inc. Bankruptcy Law Reporter (4th ed.) par. 58,825.

The controversy arose in the bankruptcy proceedings of Gayne Sales Co., Inc., a corporation, bankrupt, in the United States District Court for the Northern District of California, Southern Division, and the first order and decision was entered by the Honorable Burton J. Wyman, a Referee in Bankruptcy of the said Court, at San Francisco, California, on January 10, 1956. His decision and judgment is unreported, but is contained in the Transcript of Record on pages 43 and 44. Morris Trieber filed a petition to review the decision. The trustee filed a motion with the United States District Court for the Northern District of California, Southern Division, to dismiss the petition for review and to remand the cause to the Bankruptcy Referee for a hearing on the merits on the ground that the decision and judgment of the Referee in Bankruptcy dated January 10, 1956 was interlocutory and not a final order. An order was made and entered on April 11, 1956 by the Honorable O. D. Hamlin, United States District Judge, granting the motion to dismiss the petition of Morris Trieber for review and remanding the cause to the Referee for a hearing on the merits. His order is unreported and is contained in the Transcript of Record on pages 52 and 53. Morris

Trieber appealed from said order of the District Court to the United States Court of Appeals for the Ninth Circuit. The trustee moved to dismiss the appeal upon the ground that the order of the District Court was interlocutory, and the Circuit Court granted the motion to dismiss the appeal of Morris Trieber reported in 237 F.(2d) 117.

JURISDICTION.

Petitioner Morris Trieber invokes the jurisdiction of this Court under Title 11, U.S.C., Ch. 4, §47.

QUESTION PRESENTED.

Did the Circuit Court of Appeals err in dismissing an appeal from an interlocutory order of the District Court made in a controversy arising in a proceeding in bankruptcy granting a motion to dismiss a petition to review an order of a Bankruptcy Referee overruling an objection to his summary jurisdiction to hear an objection to a proof of claim and petition for turnover order?

STATUTE INVOLVED.

The statute involved in this case is Title 11, Ch. 4, §47 of the United States Code.

> (a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held,

are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

STATEMENT.

This controversy arises out of the proceeding of Gayne Sales Co., Inc., a corporation, bankrupt, which said corporation was adjudicated a bankrupt on August 24, 1954. Thereafter, the bankruptcy proceeding was referred to a Referee in Bankruptcy and Morris Trieber, the petitioner, filed his proof of claim (Tr. p. 4-8) with the Referee in Bankruptcy. John O. England, the respondent, as trustee of the estate

of the bankrupt corporation, filed his objection (Tr. p. 8-15) to the allowance of said proof of claim, and incorporated in his objection to said proof of claim a petition for a turnover order. Petitioner filed his Answer and Return (Tr. p. 20-42) to the objection of respondent to his proof of claim and petition for turnover order. In his Answer and Return petitioner objected to the summary jurisdiction of the Bankruptcy Referee, and after a hearing *only on the question of jurisdiction,* his plea objecting to the summary jurisdiction was overruled by the Bankruptcy Referee. (Tr. p. 43-44.) Thereafter, petitioner filed his petition to review (Tr. p. 44-52) the order of the Bankruptcy Referee overruling objection of petitioner to the summary jurisdiction of the Bankruptcy Court. Respondent filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, his notice of motion to dismiss said petition for review and to remand the cause for further hearing to the Bankruptcy Referee. The District Court granted the motion of the respondent to dismiss the petition for review of petitioner and the proceeding was remanded to the Bankruptcy Referee for further hearing. (Tr. p. 52-53.) Petitioner filed a notice of appeal to the Circuit Court of Appeals for the Ninth Circuit and respondent moved the Court of Appeals to dismiss the appeal upon the ground that the order of the District Court was interlocutory in nature and made in a controversy arising in proceedings in bankruptcy. The Circuit Court of Appeals granted the motion of respondent to dismiss the appeal of petitioner. (See 237 F.(2d) 117.)

A petition for rehearing was thereafter denied by the Court of Appeals for the Ninth Circuit. (Appendix to Petition for Writ of Certiorari p. iv.)

REASONS FOR DENYING THE WRIT.

I. The decision below is manifestly correct.

II. There is no conflict among the Courts of Appeals on the question involved.

III. The instant decision correctly construes Title 11, U.S.C., Ch. 4, §47 and is in accord with the construction given such section by other Courts of Appeals.

IV. There has been no hearing of the issues of fact or matters of law in the lower Court.

ARGUMENT.

I.

THE DECISION BELOW IS MANIFESTLY CORRECT.

The appellate jurisdiction of Courts of Appeals in bankruptcy cases includes interlocutory or final orders in proceedings in bankruptcy, but only *final orders in controversies arising in proceedings in bankruptcy.* Before entering into a discussion of and citing authorities in support of the reasons for denying the writ of certiorari, and before proceeding to answer Part I of the petition of Morris Trieber, respondent respectfully directs attention to the absence of the words "in their respective jurisdictions in proceedings in

bankruptcy" following the word "bankruptcy," in line 5 of §47, Title 11, Ch. 4, U.S.C., on page 23 of the petition. Petitioner contends, on page 24 of his petition, that since §47, Title 11, Ch. 4, U.S.C. was amended in 1938, there is no longer any distinction between "proceedings" and "controversies" in bankruptcy. His argument is clearly refuted by the following excerpt from Vol. 2, Collier on Bankruptcy (14th Ed.) pages 715-716:

> "Thus the distinction between 'proceedings in bankruptcy' and 'controversies arising in proceedings in bankruptcy' continues to be important where an interlocutory order or decree is involved. If Congress had intended that there could be appeals generally from interlocutory orders in 'controversies', as distinguished from 'proceedings', it could have easily done so in either of two ways: (1) by placing the phrase 'either interlocutory or final' before the words 'in proceedings in bankruptcy' so that the phrase would modify 'in proceedings in bankruptcy . . . and in controversies arising in proceedings in bankruptcy'; or (2) by providing that the appellate courts 'are hereby invested with appellate jurisdiction . . . to review, affirm, revise or reverse either interlocutory or final judgments or orders, both in matters of law and in matters of fact', etc. Congress did neither. Instead, it inserted the phrase 'either interlocutory or final' where, on ordinary principles of grammar, it can only modify 'in proceedings in bankruptcy.'"

While both interlocutory and final orders in *proceedings in bankruptcy* are appealable, only final orders *in*

controversies arising in proceedings in bankruptcy are appealable. The Court of Appeals, in its Opinion reported in 237 F.(2d) 117, held the order of the District Court was not appealable, being interlocutory in nature, having been made *in a controversy arising in proceedings in bankruptcy,* and said on page 118:

> "It was therefore an order made in a controversy arising in proceedings in bankruptcy, as that is used in 11 U.S.C.A. §47(a). See In re Christ's Church of the Golden Rule, 172 F. (2d) 523. The order is concededly interlocutory in nature. It follows that this court lacks jurisdiction to review such order. In re Christ's Church of the Golden Rule, supra.
>
> The motion to dismiss the appeal is ordered granted."

The District Court, in its order, (Tr. 52-53) also held that the order of the Bankruptcy Referee was interlocutory and not final and remanded the cause to the Referee *for a hearing on the merits.* There has never been a hearing on the issues raised by the objection of the trustee and his petition for turnover order and the answer of petitioner thereto. The order of the Bankruptcy Referee (Tr. 43-44), overruling the objection of petitioner to summary jurisdiction, was of a purely preliminary nature in advance of actual judicial action; no definite determination of rights was made either by the order of the Bankruptcy Referee or the District Court, and the following excerpt from Vol. 8, Remington on Bankruptcy, par. 3429, page 323 is indeed in point:

> "It has always been the position of reviewing courts that they will decline to take cognizance of an application for review of a ruling *making no definitive determination of rights, and the same view is still taken,* notwithstanding statutory appealability of interlocutory orders."

Appellant cites a number of cases on pages 26 to 34 which relate only to the appealability of either interlocutory or final orders *in proceedings in bankruptcy.* Since the interlocutory order of the District Court, in the pending matter, relates to *a controversy arising in a proceeding in bankruptcy,* the cases cited by petitioner are not applicable. Before proceeding to briefly comment upon some of the cases cited by petitioner, respondent respectfully directs the attention of this Honorable Court to an excerpt from *In re Manufacturers Trading Corporation,* (6. C.A.) 194 F. 2d 948 wherein the Circuit Court of Appeals states that not every order, even *in a proceeding in bankruptcy,* is appealable, and on page 953 the Court said:

> "Although Title 11 U.S.C.A. Sec. 47, sub. a, grants an appeal from interlocutory orders in proceedings in bankruptcy, *this does not mean that every order entered in the course of the proceedings is appealable.* Due regard for the efficiency of the administration and dispatch of the proceedings *necessitates a common-sense interpretation of the above provision of the statute in order that the right to appeal be limited within reasonable bounds.* Collier on Bankruptcy (14th Ed.), Vol. 2, Section 24.39. *'Before reviewable,* administrative orders (in bankruptcy) must have *a certain degree of finality.* The salutary pur-

> pose of the legislation would be destroyed if every order, no matter how trivial, were subject to review.' Hoehn v. McIntosh, 6 Cir., 110 F. 2d 119. See also In re Pechin, 3 Cir., 227 F. 853." (Italics added.)

Even assuming for the purpose of argument only that the order of the District Court is an interlocutory order in a proceeding in bankruptcy, nevertheless, as stated in the excerpt from *In re Manufacturers Trading Corporation,* supra, before being reviewable, the order of the District Court must have a certain degree of finality, and as stated in Vol. 8 of Remington on Bankruptcy, Par. 3429, page 323, supra, there must be a *definitive determination of rights.* The order of the District Court (Tr. 52-53) merely granted a motion to dismiss a petition for review of an interlocutory order of the Bankruptcy Referee overruling an objection of petitioner to jurisdiction.

In some of the cases cited by petitioner, the Circuit Courts of Appeals comment upon the necessity of an order being appealed from making some *definitive determination of rights.* In *Theard v. Fidelity & Deposit Co. of Maryland,* (5 C.A.) 202 F. 2d 880 at 882 the Court said:

> "It may be that such appellate jurisdiction does not extend to interlocutory orders which are *mere incidents in the inquiry and determine nothing.* See In re Hotel Governor Clinton, Inc., 2 Cir., 107 F. 2d 398." (Italics added.)

The Second Circuit Court of Appeals in *Delatour v. Meredith,* 144 Fed. 2d 594, cited by petitioner, also

indicates that an order to be appealable must have finality, as shown by the excerpt from its opinion on pages 595-596 as follows:

> ". . . and this order is surely of enough substance, denying as it does appellants' rights to communicate with other security holders without censorship by the court, to distinguish it from the few exceptions to the general rule of appealability, limited as they are *to orders of a purely preliminary nature in advance of actual judicial action.* See In re Hotel Governor Clinton, 2 Cir., 107 F. 2d 398; Federal Land Bank of Springfield v. Hansen, 2 Cir., 113 F. 2d 82, 84, 85." (Italics added.)

Petitioner also cites *Hoehn v. McIntosh* (6 C.A.) 110 F. 2d 199, wherein the Court also comments upon the necessity of administrative orders having a degree of finality and on page 201 the Court said:

> "The Statute, as it existed prior to the amendment, has been considered in numerous decisions, the rationale of which is that appeals from purely intermediate and preliminary orders should be allowed only in exceptional cases. So far as is material to the question under consideration, the amendment made no change in the law. *Before reviewable, administrative orders must have a certain degree of finality.* The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, *unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that*

> *rights may be definitely determined by review.* Tringale Electric Company v. Foutch, 8 Cir., 40 F. 2d 353; Board of Road Comr's v. Keil, 6 Cir., 259 F. 76; *In re Fox West Coast Theatres,* 9 Cir., 88 F. 2d 212; In re Throckmorton, 6 Cir., 196 F. 656." (Italics added.)

Petitioner, on pages 28-29, cites excerpts from *In re Leigh,* 139 F. 2d 386 which is a case involving an appeal, as the facts disclose, from an order in a *proceeding in bankruptcy* and not in a *controversy arising in a proceeding in bankruptcy.* Consequently, the italicized excerpt at the bottom of page 28 that the Bankruptcy Act permits an appeal as of right from all interlocutory and final orders, can only encompass orders in a *proceeding in bankruptcy* in keeping with the factual situation upon which the Court based its decision.

In the quotation from *Federal Land Bank v. Hansen,* 113 F. 2d 82, on page 30, there is to be found the following language of the Court:

> "Even in bankruptcy, various interlocutory orders *which determine nothing,* such as orders merely of reference for report, *are not reviewable* and appeals will be accordingly dismissed." (Italics added.)

Respondent respectfully submits that the above quoted excerpt from the decision cited by petitioner is applicable to the interlocutory order of the District Court (Tr. p. 52-53), *which determined nothing,* dismissing the petition to review the Referee's interlocu-

tory order and remanding the matter for a hearing before the Referee on the merits.

Petitioner, on pages 30 and 31, erroneously criticizes the decision of the Court of Appeals for the Ninth Circuit in the cases of *Pearson v. Higgins,* 34 F. 2d 27 and *Goldie v. Carr,* 130 F. 2d 335, and its 1949 decision *In re Christ's Church of the Golden Rule,* 172 F. 2d 523, although not mentioning the latter case by name. Petitioner states, on pages 31 and 32 that the Circuit Court erred in its decision in the *Goldie v. Carr* case, supra, in holding that an interlocutory order in a controversy arising in a proceeding in bankruptcy is not appealable and that the Court's "language directly contradicts the plain provisions of §47(a) itself", and "must have been inadvertently used". (Lines 29-30, p. 31 and line 3, p. 32.) Petitioner's statement that §47(a) makes interlocutory orders appealable whether made in a *controversy* in bankruptcy or in a *proceeding* in bankruptcy" (line 32, p. 31 and lines 1-2, p. 32) conflicts with the plain provisions of §47(a) that only *final orders* are appealable in a *controversy in bankruptcy.* It is, therefore, submitted that the comments of petitioner on the rulings of the Circuit Court in *Goldie v. Carr* supra, are not well-founded.

The facts in the *Arkansas Corporation Commission v. Thompson,* 116 F. 2d 179, *Cohen v. Eleven West 42d Street, Inc.,* 115 F. 2d 531, and *Columbia Foundry Co. v. Lochner,* 179 F. 2d 630 cases on pages 31-34 of petitioner's brief disclose appeals from interlocutory orders made in a *proceeding in bankruptcy* and

do not relate to *controversies arising in proceedings in bankruptcy.* The lack of any factual similarity does not necessitate any further comment.

It is respectfully submitted that the decision below of the Court of Appeals for the Ninth Circuit is manifestly correct. It affirmed an interlocutory order *in a controversy arising in proceedings in bankruptcy,* and such an order of the District Court is not appealable under the provisions of Title 11, U.S.C., Ch. 4, Par. 47. The order of the District Court only decided an intervening matter pertaining to the proceeding pending before the Referee in Bankruptcy and remanded the matter to the Referee in Bankruptcy in order that he might proceed to adjudicate the cause on the merits. The decision of the Court of Appeals for the Ninth Circuit held that the order of the District Court was concedely interlocutory in nature and that the Circuit Court lacked jurisdiction to review the order. It is therefore evident that the decision of the Court of Appeals for the Ninth Circuit is manifestly correct and it denied a petition for a rehearing of its order.

II.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION INVOLVED.

Petitioner states on page 22 of his petition that the Court of Appeals for the Ninth Circuit has rendered a decision in conflict with the decisions of other Courts of Appeals. Respondent respectfully directs the attention of this Court to the decisions of the

Court of Appeals for the Second, Third, Fifth and Eighth Circuits which held that interlocutory orders in controversies arising in proceedings in bankruptcy are not appealable. Consequently, there is no conflict between these decisions of the other Circuits with the decision of the Court of Appeals for the Ninth Circuit from which petitioner prays for the issuance of a Writ of Certiorari. Respondent will briefly discuss the decisions of the other Circuit Court of Appeals.

In the case of *In re Federal Photo Engraving Corporation,* (2 C.A.) 54 F. 2d 628 the District Court reversed an order of the Bankruptcy Referee sustaining an objection to his summary jurisdiction to hear a petition of a bankruptcy trustee for a turnover order. The Circuit Court dismissed an appeal from the interlocutory order of the District Court and on page 629 said:

> "A determination of the existence of summary jurisdiction, such as the District Judge made in the present case without passing on the merits, is not a final order. *The rights of appellant are not finally adjudicated until the referee has denied relief to the receiver or entered a so-called 'turn-over order' against the appellant. In re Russell* (C.C.A.) 101 F. 248; *In re Rose Shoe Mfg. Co.* (C.C.A.) 168 F. 39; *Pearson v. Higgins,* (C.C.A.) 34 F. 2d 27, certiorari denied 280 U.S. 593, 50 S. Ct. 39, 74 L. Ed. 641; *Seattle Curb Exchange v. Knight* (C.C.A.) 46 F. 2d 34." (Italics added.)

In *Lieberman v. Bancroft,* (3 C.A.) 69 F. 2d 202 an appeal to the Circuit Court was taken from a Dis-

trict Court order refusing to vacate its interlocutory decree directing an ancillary receiver of the bankrupt corporation to turn over assets to the bankruptcy trustees. A motion of appellees to dismiss the appeal was granted, and on pages 205-206 the Court said:

> "The appellees have moved to dismiss the appeal on the ground, inter alia, that this court has no jurisdiction. They allege that the decree is an interlocutory order which does not settle any of the rights of the appellants and is not a final order within the meaning of 11 USCA § 47." . . .
>
> The order of the District Court does not purport to make a final determination of the rights of the bankrupt estate and of Frank & Seder Company in the two Pennsylvania stores. Should a receiver be appointed or a trustee elected for Frank & Seder Company, that issue may still be raised by appropriate pleadings. *Tested by these standards, the decree is interlocutory, and the appeal, being premature, must be dismissed.*" (Italics added.)

In *Universal Oil Products Co. v. Cosden Petroleum Corp.*, (5 C.A.) 178 F. 2d 495, a challenge to its summary jurisdiction was rejected by the District Court. Following an appeal of the interlocutory order in a controversy arising in proceedings in bankruptcy to the Circuit Court, a motion to dismiss the appeal was made. In granting the motion, the Court said on pages 496-497:

> "Appellees, pointing out that the order sought to be appealed from is not a final order but an interlocutory order in a 'controversy arising in

proceedings in bankruptcy', have moved to dismiss the appeal.

Appellants, not at all denying appellee's premise that the appeal ordered was issued in a controversy arising in proceedings in bankruptcy and is interlocutory, insist that under Sec. 24, sub. a, of the Bankruptcy Act. 11 U.S.C.A. § 47, sub. a, the order, though interlocutory, is appealable.

We do not think so. Read in its own light in the light of the authorities cited and relied on by appellees, we think it quite clear that the invoked section permits appeals from interlocutory orders only where they are issued in 'proceedings in bankruptcy' *and that it does not permit appeals from such orders issued, as here, "in controversies arising in proceedings in bankruptcy."* (Italics added.)

The facts in *Kelso v. McLaren,* (8 C.A.) 122 F. 2d 867 relate to an appeal of an interlocutory order of the District Court affirming on review the order of a Bankruptcy Referee denying a motion challenging his summary jurisdiction to hear a petition of a bankruptcy trustee for a turnover order. The Circuit Court granted the motion to dismiss the appeal and said on page 869:

"It is clear that the proceeding instituted by the trustee presented a 'controversy arising in a proceeding in bankruptcy' as distinguished from an administrative 'proceeding in bankruptcy'. 11 U.S.C.A. §§46 and 47. . . . At this time the appeal must be dismissed upon the motion of the trustee *because the determination of*

> *the existence of summary jurisdiction, such as was made in this case without passing upon the merits, is not a final order, and is not appealable.* Section 24, sub. a, of the Bankruptcy Act, as amended by the Act of June 22, 1938, 11 U.S.C.A. § 47, sub. a, provides for appeals '. . . in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and matters of fact.' *Under this section appeals in 'controversies' may be taken to this court from final orders only.* Goldie v. Carr, 9 Cir., 116 F. 2d 335; Hoehn v. McIntosh, 6 Cir., 110 F. 2d 199; Stein v. Elizabeth Trust Co., 3 Cir., 104 F. 2d 777, 779, Lieberman v. Bancroft, 3 Cir., 69 F. 2d 202, 205; Triangle Electric Co. v. Foutch, 8 Cir., 40 F. 2d 353; Pearson v. Higgins, 9 Cir., 34 F. 2d 27; In re Federal Photo Engraving Corporation, 2 Cir., 54 F. 2d 628." (Italics added.)

In *Pearson v. Higgins,* (9 C.A.) 34 F. 2d 27 the Court of Appeals for the Ninth Circuit held that an order overruling an objection to jurisdiction was an unappealable order, and said on page 28:

> "Manifestly, therefore, the appeal is premature. *In an ordinary case at law or in equity, an order overruling an objection to the court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding.* Appellants could have no real grievance unless and until the referee entered a turnover order. *After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain.* Appellate courts do not

sit to anticipate possible grievances or to try out controversies in piecemeal.

The appeal will therefore be dismissed without prejudice to any question of jurisdiction or upon the merits; costs to appellee." (Italics added.)

A Petition for Writ of Certiorari was filed with this Honorable Court and the Petition was denied. (280 U.S. 593, 50 S. Ct. 39, 74 L. ed. 641.)

Respondent respectfully submits that the decisions of the above-cited Second, Third, Fifth and Eighth Circuit Court of Appeals show that there is no conflict with the decision of the Court of Appeals for the Ninth Circuit for which the issuance of a Writ of Certiorari is prayed. Furthermore, this Court has had for consideration the issuance of a Writ of Certiorari in the decision of the Court of Appeals for the Ninth Circuit in *Pearson v. Higgins* supra, and as above stated, this Court denied a petition for the issuance of a writ.

III.

THE INSTANT DECISION CORRECTLY CONSTRUES TITLE 11, U. S. C., CH. 4, §47 AND IS IN ACCORD WITH THE CONSTRUCTION GIVEN SUCH SECTION BY OTHER COURTS OF APPEALS.

The Court of Appeals held that the District Court order was interlocutory in nature and was made in a *controversy in proceedings in bankruptcy.* Such an order is not appealable under the provision of Title

11, U.S.C. Ch. 4, §47 supra, which only permits appeals from interlocutory or final orders *in proceedings in bankruptcy.* The Circuit Court did not err in its decision granting the motion to dismiss the appeal from the District Court interlocutory order, and correctly construed Title 11, U.S.C., Ch. 4, §47 supra. The decision is in accord with the decisions of Courts of Appeals for the Second, Third, Fifth and Eighth Circuits, supra, and this Honorable Court refused to issue a Writ of Certiorari in *Pearson v. Higgins,* (9 C.A.) supra, having a factual similarity to the pending matter.

IV.

THERE HAS BEEN NO HEARING OF THE ISSUES OF FACT OR MATTERS OF LAW IN THE LOWER COURT.

Before briefly discussing the above topic, some comment should be made of the subject matter of Parts II and III of the Petition of petitioner. He contends that a Bankruptcy Court lacks jurisdiction of a controversy between a bankruptcy trustee and one *not a party to the proceeding.* Also, that a Bankruptcy Referee and a District Court are without jurisdiction to make a turnover order. His arguments, however, are of no force or effect since he is a *party to the proceeding* by having filed his proof of claim (Tr. pages 4-8) with the Bankruptcy Referee. Having thus submitted himself to the jurisdiction of the Bankruptcy Court, his arguments and cases cited in Parts II and III of his Petition are not in point.

Parts IV and V of his Petition relate to his defenses of the Statute of Limitations and Res Adjudicata. Since there has been no hearing of the issues of fact or matters of law before the Bankruptcy Referee, petitioner will have the opportunity to submit his defenses and authorities to the Bankruptcy Referee at the hearing of the objection of the trustee to the Proof of Claim and Petition for Turnover order, pursuant to the order of the District Court (Tr. 52-53) remanding the cause to the Bankruptcy Referee for a hearing on the merits.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition of Morris Trieber for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
December 1, 1956.

Respectfully submitted,
HERBERT L. FAULKNER,
Counsel for Respondent.

JAMES M. CONNERS,
MORRIS M. GRUPP,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 555

MORRIS TRIEBER,
Petitioner,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of GAYNE SALES Co., INC., a corporation, Bankrupt,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION.

To Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner feels constrained to file a timely reply to respondent's brief in opposition to his petition for a writ of certiorari on file herein, despite the

full statement of the case and the extensive argument on the questions involved which the petition sets forth.

The purpose of this reply is to refute certain palpably incorrect statements of both law and fact appearing in respondent's brief and to direct attention to the omission of respondent to make any answer whatsoever to what we consider almost compulsory reasons for the granting of the writ.

I.

THE DISMISSAL OF PETITIONER'S APPEAL BY THE COURT OF APPEALS IGNORES THE SPECIFIC PROVISIONS OF THE STATUTE.

Commencing at page 6 of the brief of respondent it is argued by counsel that "since the interlocutory order of the district Court, in the pending matter, relates to *a controversy arising in a proceeding in bankruptcy,* the cases cited by petitioner are not applicable." In the *per curiam* opinion of the Court of Appeals a similar statement is made:

> "The order was entered in connection with a dispute between the trustee and an adverse claimant, concerning the right and title to the bankrupt estate. It was therefore an order made in a controversy arising in proceedings in bankruptcy, as that term is used in 11 U.S.C.A. No. 47(a). See *In re Christ's Church of the Golden Rule,* 172 F. (2d) 523. The order is concededly interlocutory in nature. It follows that this court lacks jurisdiction to review such order. *In re Christ's Church of the Golden Rule, supra.*"

Now we submit that the plain provisions of the statute give the right of appeal from interlocutory orders whether made in proceedings in bankruptcy or in controversies arising in proceedings in bankruptcy.

We quoted the statute in *haec verba* in the district Court and in the Court of Appeals and in the petition for a writ of certiorari addressed to this Honorable Court, but the two lower Courts and the respondent as well seem to have been utterly oblivious to the meaning of plain English words. We again quote subdivision (a) of Section 47, Title 11, U.S.C.A.:

> "The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy, *either interlocutory or final,* and *in controversies arising in proceedings in bankruptcy,* to review, affirm, revise, or reverse, both in matters of law and in matters of fact, etc."

Yet in the face of this plain and unambiguous language, the Court of Appeals has held and counsel still argue that only final controversies arising in proceedings in bankruptcy are appealable.

How could the statute be plainer than it is?

The Court of Appeals granted the motion to dismiss upon the sole ground of want of jurisdiction. Obviously that learned Court can no more decline jurisdiction which it *does possess* than it can assume jurisdiction which it *does not possess.*

Its clear duty was to hear and determine the appeal on the merits.

Counsel for respondent in support of their argument have twice cited 8 Remington on Bankruptcy 323, to the effect that there must be a "definitive determination of rights" in order to make an interlocutory order appealable.

We beg leave to quote the actual language of Remington, emphasizing its most significant statement:

> "The original provisions of Sections 24-25 of the 1898 bankruptcy act were quite at variance from the present form. It contemplated possible use of a writ of error or of certiorari, as well as appeals in equity; were so phrased as to indicate a distinction between; 'controversies arising in bankruptcy' and 'bankruptcy proceedings'; and the only expressly appealable orders were (1) a judgment adjudging bankruptcy, (2) a judgment granting or giving a discharge, and (3) a judgment allowing or rejecting a claim of $500 or more. To state that this left things in considerable doubt and uncertainty reflects polite restraint in the use of stronger terms. In certain respects, some of the older decisions still have value, but the majority of them, since the 1926 and 1938 amendment of the sections herein involved, are worthless. It can be said now that appeal lies from *any* order, either interlocutory or final, whether entered in a 'controversy arising in bankruptcy,' or in a 'bankruptcy proceeding,' by which the appellant is aggrieved. *There is no longer any doubt about the appealability of the various and sundry intermediate or interlocutory orders*

in the course of bankruptcy administration, provided they have actual significance."

It thus clearly appears from the language of the learned author that the statute as amended in 1938 draws no distinctions between proceedings in bankruptcy and controversies arising in proceedings in bankruptcy.

Moreover, commencing at page 26 of the petition for certiorari, petitioner has listed almost a score of decisions in which, since the amendment of the statute, the circuit courts of appeals have held interlocutory orders appealable or entertained appeals therefrom. The only note taken of these decisions by respondent is to argue that in each case the order appealed from was made in a proceeding in bankruptcy and not to a controversy arising in a proceeding in bankruptcy. Under the plain provisions of the statute and the authorities which petitioner has cited both here and in his petition, it matters not one whit whether the interlocutory order appealed from was made in a *proceeding* or in a *controversy*.

II.

THE STATEMENT IN RESPONDENT'S BRIEF THAT THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION INVOLVED IS INACCURATE.

Under this heading in his brief respondent cites certain decisions, one of which, *Pearson v. Higgins,* 34 Fed.(2d) 27, is by the Ninth Circuit itself. Petitioner did not erroneously criticize that decision as respondent states at page 13 of his brief. It was written by

the late Judge Dietrich, an accurate and scholarly judge for whom we had the highest respect. Under the law as it stood at that time, the decision was correct. But the case was decided prior to the amendment of 1938 which invests the Courts of Appeals with appellate jurisdiction from interlocutory orders. It is no longer the law. Our criticism of *Goldie v. Carr,* 130 Fed. (2d) 335, and *In Re Christ's Church of the Golden Rule,* 172 Fed. (2d) 523, is that each of these cases ignores the change in the statute.

The decision of the Court of Appeals in the case at bar is certainly at variance with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Arkansas Corporation Commission v. Thompson,* 116 Fed. (2d) 179; of the Second Circuit in *Cohen v. Eleven West 42nd Street, Inc.,* 115 Fed. (2d) 531; and of the Fourth Circuit in *Columbia Foundry Co. v. Lochner,* 179 Fed. (2d) 630, 14 A.L.R. (2d) 1349.

In the case last cited, the Court uses language extremely pertinent in the case at bar:

> "However, even prior to the enactment of Section 24, sub a, *an interlocutory order overruling an objection to jurisdiction had been held appealable. In re Margolies,* 2 Cir. 266 F 203; see *In re Hotel Governor Clinton, Inc.,* 2 Cir. 107 F 2d 398, 399. It is our view that in consideration of the importance of the question involved, the appeal in this case should be entertained, and the motion to dismiss is therefore denied."

This brings us to the question of jurisdiction of the Bankruptcy Court.

III.

THE WRIT SHOULD BE GRANTED FOR THE REASON THAT UNDER A LONG LINE OF DECISIONS NEITHER THE REFEREE NOR THE DISTRICT COURT HAD ANY JURISDICTION TO MAKE THE TURN-OVER ORDER SOUGHT BY THE REFEREE.

The rule is well established by a long line of decisions that a bankruptcy court has no jurisdiction to make a turn-over order where the property is not in the possession, actual or constructive, of the Court itself because the third party "has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.'"

Cline v. Kaplan, 323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97.

See to the same effect:

Galbraith v. Vallely, 256 U.S. 46, 41 S.Ct. 415, 65 L.Ed 823;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770.

A turn-over order cannot be issued to recover damages—the precise thing which the trustee is endeavoring to do in the case at bar.

Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 82 L.Ed. 476.

We once more direct attention to the forthright statement of the injustice and absurdity of such a proceeding by the Circuit Court of Appeals of the Second Circuit in the case of *In re Luma Camera Service,* 157 Fed. (2d) 951.

As stated by Judge Soper in *Columbia Foundry Co. v. Lochner,* supra, an order overruling an objection to jurisdiction had been held appealable even prior to the amendment of 1938.

It is highly significant that respondent utterly ignores these decisions, all of which are cited in the petition.

CONCLUSION.

It is submitted that the brief for respondent signally fails to answer any of the contentions raised by petitioner, and that in furtherance of justice, to uphold the right of appeal granted by the plain provisions of the statute, and to prevent the unjust harassment of the petitioner by prolonged and expensive proceedings which the bankruptcy Court has no jurisdiction to institute, the petition should be granted and the judgment of the Court of Appeals reversed.

Dated, San Francisco, California,
December 10, 1956.

MORRIS TRIEBER,
Petitioner in Propria Persona.

JOSEPH A. BROWN,
Of Counsel.